



NOV 19 2012

Dear Tribal Leader:

The Centers for Medicare & Medicaid Services (CMS) is committed to engaging in meaningful consultation with Tribes on matters that have tribal implications. To that end, and in partnership with the Indian Health Service, we are writing to request your advice and input regarding the enclosed draft Model Qualified Health Plan (QHP) Addendum for Indian health care providers and a companion document that outlines the purpose and key provisions of the Addendum.

In response to comments made during previous Tribal consultations, CMS drafted a Model QHP Addendum to facilitate the inclusion of Indian health care providers in the QHP provider networks. This Addendum was developed with input from the CMS Tribal Technical Advisory Group and the Indian Health Service. It is similar to the current Medicare Part D Addendum used by Indian health pharmacies participating in the Medicare Prescription Drug program. The Model QHP Addendum is also intended to assist issuers to comply with the QHP certification standards. We anticipate that having the Model QHP Addendum will assist QHP issuers and providers by outlining relevant provisions of federal law that have an impact on the relationship between an issuer and a network provider. By offering contracts with provisions outlined in the Addendum, QHP issuers will be able to contract more efficiently with Indian health care providers and help ensure that American Indians and Alaska Natives (AI/AN)s can continue to be served by their Indian provider of choice. Although the Model QHP Addendum is not required, CMS will strongly encourage its use by QHPs.

Webinar

CMS will host a webinar on the Addendum for Tribal leaders along with the Indian Health Service, Tribal and Urban Indian health programs to raise questions and comments.

Date: Friday, December 7, 2012

Time: 1:00-2:30pm, Eastern Time

Call-in Number: 888-339-3507, Passcode: 304063

Webinar Link: <http://kauffmaninc.adobeconnect.com/alltribescalldecember/> Enter room as a guest.

Written Comments

CMS is extending you an opportunity to provide written comments regarding the proposed Model QHP Addendum by Wednesday, December 19, 2012. We apologize in advance for the short notice, but we need to obtain your input in a timely manner.

- E-mailed comments may be sent to TribalAffairs@cms.hhs.gov
- Comments delivered by postal mail should be addressed to:

Marilyn Tavenner
Acting Administrator
Centers for Medicare & Medicaid Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

We look forward to your comments on the Model QHP Addendum.

Sincerely,



Marilyn Tavenner
Acting Administrator
Centers for Medicare & Medicaid



Yvette Roubideaux, M.D., M.P.H.
Director
Indian Health Service

Enclosures

DRAFT
Model QHP Addendum for Indian Health Care Providers

1. Purpose of Addendum; Supersession.

The purpose of this Addendum for Indian health care providers is to apply special terms and conditions necessitated by federal law and regulations to the network provider agreement by and between _____ (herein "Qualified Health Plan" and/or "QHP") and _____ (herein "Provider"). To the extent that any provision of the Qualified Health Plan's network provider agreement or any other addendum thereto is inconsistent with any provision of this Addendum, the provisions of this Addendum shall supersede all such other provisions.

2. Definitions.

For purposes of the Qualified Health Plan's agreement, any other addendum thereto, and this Addendum, the following terms and definitions shall apply:

- (a) "Contract health services" has the meaning given in the Indian Health Care Improvement Act (IHCIA) Section 4(5), 25 U.S.C. § 1603(5).
- (b) "Indian" has the meaning given in the IHCIA Section 4, 25 U.S.C. § 1603 and the Indian Self-Determination and Education Assistance Act (ISDEAA) Section 4(d), 25 U.S.C. § 450b.
- (c) "Provider" means a health program administered by the Indian Health Service, a tribal health program, an Indian tribe or a tribal organization to which funding is provided pursuant to 25 U.S.C. § 47 (commonly known as the "Buy Indian Act"), or an urban Indian organization that receives funding from the IHS pursuant to Title V of the IHCIA (Pub. L. 94-437), as amended, and is identified by name in Section 1 of this Addendum.
- (d) "Indian Health Service or IHS" means the agency of that name within the U.S. Department of Health and Human Services established by the IHCIA Section 601, 25 U.S.C. § 1661.
- (e) "Indian tribe" has the meaning given in the IHCIA Section 4(14), 25 U.S.C. § 1603(14).
- (f) "Qualified Health Plan" (QHP) has the meaning given in Section 1301 of the Affordable Care Act, 42 U.S.C. § 18021.
- (g) "Tribal health program" has the meaning given in the IHCIA Section 4(25), 25 U.S.C. § 1603(25).
- (h) "Tribal organization" has the meaning given in the IHCIA Section 4(26), 25 U.S.C. § 1603(26).
- (i) "Urban Indian organization" has the meaning given in the IHCIA Section 4(29), 25 U.S.C. § 1603(29).

3. Description of Provider.

The Provider identified in Section 1 of this Addendum is (check the appropriate box):

The IHS.

An Indian tribe that operates a health program under a contract or compact to carry out programs of the IHS pursuant to the ISDEAA, 25 U.S.C. § 450 et seq.

A tribal organization that operates a health program under a contract or compact to carry out programs of the IHS pursuant to the ISDEAA, 25 U.S.C. § 450 et seq.

A tribe or tribal organization that operates a health program with funding provided in whole or part pursuant to 25 U.S.C. § 47 (commonly known as the Buy Indian Act).

/ / An urban Indian organization that operates a health program with funds in whole or part provided by IHS under a grant or contract awarded pursuant to Title V of the IHCA.

4. Persons Eligible for Items and Services from Provider.

- (a) The parties acknowledge that eligibility for services at the Provider's facilities is determined by federal law, including the IHCA, 25 U.S.C. § 1601, et seq. and/or 42 C.F.R. Part 136. Nothing in this agreement shall be construed to in any way change, reduce, expand, or alter the eligibility requirements for services through the Provider's programs.
- (b) No term or condition of the QHP's agreement or any addendum thereto shall be construed to require the Provider to serve individuals who are ineligible under federal law for services from the Provider. The QHP acknowledges that pursuant to 45 C.F.R. 80.3(d), an individual shall not be deemed subjected to discrimination by reason of his/her exclusion from benefits limited by federal law to individuals eligible for services from the Provider.

5. Applicability of Other Federal Laws.

Federal laws and regulations affecting the Provider, include but are not limited to the following:

(a) The IHS as a Provider:

- (1) Anti-Deficiency Act, 31 U.S.C. § 1341;
- (2) ISDEAA, 25 U.S.C. § 450 et seq.;
- (3) Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680;
- (4) Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653;
- (5) Federal Privacy Act of 1974 ("Privacy Act"), 5 U.S.C. § 552a, 45 C.F.R. Part 5b;
- (6) Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. Part 2;
- (7) Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 C.F.R. Parts 160 and 164; and
- (8) IHCA, 25 U.S.C. § 1601 et seq.

(b) An Indian tribe or a Tribal organization that is a Provider:

- (1) ISDEAA, 25 U.S.C. § 450 et seq.;
- (2) IHCA, 25 U.S.C. § 1601 et seq.;
- (3) FTCA, 28 U.S.C. §§ 2671-2680;
- (4) Privacy Act, 5 U.S.C. § 552a, 45 C.F.R. Part 5b; and
- (5) HIPAA, 45 C.F.R. Parts 160 and 164.

(c) An urban Indian organization that is a Provider:

- (1) IHCA, 25 U.S.C. § 1601 et seq. (including without limitation pursuant to the IHCA Section 206(e)(3), 25 U.S.C. § 1621e(e)(3), regarding recovery from tortfeasors);
- (2) Privacy Act, 5 U.S.C. § 552a, 45 C.F.R. Part 5b; and
- (3) HIPAA, 45 C.F.R. Parts 160 and 164.

6. Non-Taxable Entity.

To the extent the Provider is a non-taxable entity, the Provider shall not be required by a QHP to collect or remit any federal, state, or local tax.

7. Insurance and Indemnification.

- (a) *Indian Health Service.* The IHS is covered by the FTCA which obviates the requirement that IHS carry private malpractice insurance as the United States consents to be sued in place of federal employees for any damages to property or for personal injury or death caused by the negligence or wrongful act or omission of federal employees acting within the scope of their employment. 28 U.S.C. §§ 2671-2680. Nothing in the QHP network provider agreement shall be interpreted to authorize or obligate any IHS employee to perform any act outside the scope of his/her employment. The IHS shall not be required to acquire insurance, provide indemnification, or guarantee that the QHP will be held harmless from liability.
- (b) *Indian Tribes and Tribal Organizations.* A Provider which is an Indian tribe or a tribal organization shall not be required to obtain or maintain professional liability insurance to the extent such Provider is covered by the FTCA pursuant to federal law (Pub.L. 101-512, Title III, § 314, as amended by Pub.L. 103-138, Title III, § 308 (codified at 25 U.S.C. § 450f note); and 25 C.F.R. Part 900, Subpt. M.). Nothing in the QHP network provider agreement or any addendum thereto shall be interpreted to authorize or obligate such Provider or any employee of such provider to operate outside of the scope of employment of such employee. Such Provider shall not be required to acquire insurance, provide indemnification, or guarantee that the QHP will be held harmless from liability.
- (c) *Urban Indian Organizations.* To the extent a Provider that is an urban Indian organization is covered by the FTCA pursuant to Section 224(g)-(n) of the Public Health Service Act, as amended by the Federally Supported Health Centers Assistance Act, Pub.L. 104-73, (codified at 42 USC § 233(g)-(n)), 42 C.F.R. Part 6, such Provider shall not be required to obtain or maintain professional liability insurance. Nothing in the QHP network provider agreement or any addendum thereto shall be interpreted to authorize or obligate such Provider or any employee of such Provider to operate outside of the scope of employment of such employee. Such Provider shall not be required to acquire insurance, provide indemnification, or guarantee that the QHP will be held harmless from liability.

8. Licensure of Health Care Professionals.

- (a) *Indian Health Service.* States may not regulate the activities of IHS-operated health care programs nor require that IHS health care professionals be licensed in the state where they are providing services, whether the IHS employee is working at an IHS-operated facility or has been assigned to a health care program of a tribe, tribal organization, or urban Indian organization. The parties agree that during the term of the QHP's agreement, IHS health care professionals shall hold state licenses in accordance with applicable federal law, and that IHS facilities shall be accredited in accordance with federal statutes and regulations.
- (b) *Indian tribes and tribal organizations.* Section 221 of the IHCA, 25 U.S.C. § 1621t, exempts a health care professional employed by an Indian tribe or tribal organization from the licensing requirements of the state in which such tribe or organization performs services, provided the health care professional is licensed in any state. The parties agree that these federal laws apply to the QHP's agreement and any addenda thereto.
- (c) *Urban Indian organizations.* To the extent that any health care professional of an urban Indian provider is exempt from state regulation, such professional shall be deemed qualified to perform services under the QHP Sponsor's agreement and all addenda thereto, provided such employee is licensed to practice in any state. The parties agree that this federal law applies to the QHP's agreement and any addenda thereto.

9. Licensure of Provider; Eligibility for Payments.

To the extent that the Provider is exempt from state licensing requirements, such Provider shall not be required to hold a state license to receive any payments under the QHP network provider agreement and any addendum thereto.

10. Dispute Resolution.

In the event of any dispute arising under the QHP network provider agreement or any addendum thereto, the parties agree to meet and confer in good faith to resolve any such disputes.

If the Provider is an IHS provider, the laws of the United States shall apply to any problem or dispute hereunder that cannot be resolved by and between the parties in good faith.

11. Governing Law.

The QHP network provider agreement and all addenda thereto shall be governed and construed in accordance with federal law of the United States. In the event of a conflict between such agreement and all addenda thereto and federal law, federal law shall prevail. Nothing in the QHP network provider agreement or any addendum thereto shall subject an Indian tribe, tribal organization, or urban Indian organization to state law to any greater extent than state law is already applicable.

12. Medical Quality Assurance Requirements.

To the extent the QHP imposes any medical quality assurance requirements on its network providers, any such requirements applicable to the Provider shall be subject to Section 805 of the IHCA, 25 U.S.C. § 1675.

13. Claims Format.

Pursuant to Section 206(h) of the IHCA, 25 U.S.C. § 1621e(h), the QHP may not deny a claim submitted by the Provider based on the format in which submitted if the format used complies with that required for submission of claims under Title XVIII of the Social Security Act or recognized under Section 1175 of such Act.

14. Payment of Claims.

The QHP shall pay claims from the Provider in accord with federal law, including Section 206 of the IHCA, 25 U.S.C. § 1621e, except to the extent the Provider expressly agrees in writing to the rates or amounts specified in this agreement as payment in full, provided that such rates or amounts shall not be lower than the generally applicable payment rate that the QHP pays to any of its other preferred or in-network providers. Further, payments to the Provider shall be in accordance with Section 1402(d)(2)(B) of the Affordable Care Act, 42 U.S.C. § 18071(d)(2)(B).

15. Hours and Days of Service.

The hours and days of service of the Provider shall be established by such Provider. At the request of the QHP, such Provider shall provide written notification of its hours and days of service.

16. Contract Health Service Referral Requirements

The QHP may not require the Provider to make referrals to the QHP’s participating network providers if the Provider determines that such referrals would conflict with federal law or referral requirements under the contract health service program.

17. Sovereign Immunity.

Nothing in the QHP network provider agreement or in any addendum thereto shall constitute a waiver of federal or tribal sovereign immunity.

18. Endorsement.

An endorsement of a non-federal entity, event, product, service, or enterprise may be neither stated nor implied by the IHS Provider or IHS employees in their official capacities and titles. Such agency names and positions may not be used to suggest official endorsement or preferential treatment of any non-federal entity under this agreement.

APPROVALS

For the Qualified Health Plan:

Date _____

For the Provider:

Date _____

DRAFT

Overview of the Model QHP Addendum for Indian Health Care Providers

I. Purpose

CMS has developed the attached Model QHP Addendum for Indian health care providers to facilitate the inclusion of Indian Health Service (IHS), tribes and tribal organizations, and urban Indian organization (I/T/U) providers in qualified health plan (QHP) provider networks and help health insurance issuers comply with the QHP certification standards set forth in 45 C.F.R. Part 156. Similar to the standardized contract addendum used in the Medicare Part D program, this Model QHP Addendum has been developed for QHP issuers to use when contracting with I/T/U providers. This Model QHP Addendum is not required, but the U.S. Department of Health and Human Services (HHS) received several comments supporting the development and issuance of a model addendum for this purpose to assist QHP issuers in including I/T/U providers in their networks.

The federal government has a historic and unique relationship with Indian tribes. In adhering to QHP certification standards, QHP issuers should reach out to I/T/U providers. A significant portion of American Indians and Alaska Natives (AI/ANs) access care through longstanding relationships with providers in the Indian health system. An important consideration in evaluating network adequacy and essential community provider accessibility will be the extent to which a QHP includes I/T/U providers and whether it can assure that services to AI/ANs will be accessible without unreasonable delay.

It is anticipated that the Model QHP Addendum will assist issuers to meet the QHP certification standards and facilitate acceptance of network contracts by I/T/U providers. We anticipate that offering contracts that include the Model QHP Addendum will provide QHP issuers with an efficient way to establish contract relationships with I/T/U providers, and also ensure that AI/ANs can continue to be served by their Indian provider of choice.

Indian tribes are entitled to special protections and provisions under federal law, which are described further in Section II. The Addendum identifies several specific provisions that have been established in federal law that apply when contracting with I/T/U providers. The use of this Model QHP Addendum benefits both QHPs and the I/T/U providers by lowering the perceived barriers to contracting, assuring QHP issuers comply with key federal laws that apply when contracting with I/T/U providers, and minimizing potential disputes. AI/ANs enrolled in QHPs will be better served when I/T/U providers can coordinate their care through the QHP network.

II. Key Provisions in the Addendum

The following is a synopsis of key provisions outlined in the Addendum.

Persons Eligible for Items and Services from an Indian Health Care Provider: This section acknowledges that Indian health programs are generally not available to the public; they are established to serve AI/ANs, as provided in the Indian Health Care Improvement Act (IHCA). The applicable eligibility rules are generally set out in the IHS regulations at 42 C.F.R. Part 136. The IHCA §813 (25 U.S.C. §1680c) sets out the circumstances under which certain non-AI/ANs connected with an AI/AN (such as minor children or a spouse) can receive services as beneficiaries. Also, the IHCA § 813 authorizes services to certain other non-AI/ANs if defined

requirements are satisfied. Pursuant to 45 C.F.R. 80.3(d), an individual shall not be deemed as subjected to discrimination by reason of his/her exclusion from benefits limited by federal law to individuals eligible for services from an Indian Health Program.

Applicability of Other federal Law: This section describes several federal laws that apply variously when contracting with I/T/U providers.

- *Indian Self-Determination and Education Assistance Act (ISDEAA)*, 25 U.S.C. § 450 et seq. This law directs the Department of Health and Human Services (HHS) at the request of an Indian tribe, to enter into a contract or compact with a tribe, a tribal organization, or an inter-tribal consortium to operate federal health programs for AI/ANs with the funds the IHS would have otherwise used to carry out the program directly. Through this law, many Indian tribes and tribal organizations have taken over direct operation of health programs from the IHS.
- *Federal Tort Claims Act (FTCA)*, 28 U.S.C. §§ 2671-2680. Congress generally extended the FTCA to cover Indian tribes and tribal organizations operating federal programs pursuant to contracts or compacts under the ISDEAA, 25 U.S.C. § 450f. Urban Indian organization health providers who acquire Federally Qualified Health Center status under Section 224 of the Public Health Service Act can acquire FTCA coverage. Since a claim under the FTCA is the exclusive remedy for actions against Indian health care providers that are covered by the FTCA, those entities are not required to obtain separate professional liability insurance.
- *Federal Medical Care Recovery Act (FMCRA)*, 42 U.S.C. §§ 2651-2653. This law authorizes federal agencies, including the IHS, to recover from a tortfeasor (or an insurer of a tortfeasor) the reasonable value of health services furnished to a tortfeasor's victim. The right of recovery under the FMCRA extends to Indian tribes and tribal organizations operating ISDEAA contracts and compacts. 25 U.S.C. § 1621.
- *Federal Privacy Act*, 5 U.S.C. § 552a, 45 C.F.R. Part 5b. This law and its regulations apply to the IHS, and to Indian tribes, tribal organizations, and urban Indian organizations that operate federally-funded health care programs. The Privacy Act governs the use and disclosure of personally identifiable information about individuals that is maintained in a federal system of records.
- *Confidentiality of Alcohol and Drug Abuse Patient Records*, 42 C.F.R. Part 2. These regulations restrict disclosure and use of drug abuse patient records that are maintained in connection with the performance of any federally assisted alcohol or drug abuse program. The restrictions would apply to any such records maintained by the IHS, an Indian tribe, tribal organization, or urban Indian organization.
- *Health Insurance Portability and Accountability Act (HIPAA)*, (45 C.F.R. Parts 160 and 164). These regulations restrict access to and disclosure of protected health information maintained by covered entities, including covered health care providers operated by the IHS, Indian tribes, tribal organizations, and urban Indian organizations.
- *Indian Health Care Improvement Act (IHCA)*, 25 U.S.C. § 1601 et seq. This law provides the comprehensive statutory framework for delivery of health care services to AI/ANs. It

applies to all Indian health providers operating ISDEAA contracts and compacts from the Secretary of the HHS; and urban Indian organizations that receive grants from IHS under Title V of the IHCA. Specific provisions of the IHCA that would impact contracts between Indian health care providers and QHPs are cited in various provisions of the Addendum.

Insurance and Indemnification: I/T/U providers are generally covered by the FTCA. Since a claim under the FTCA is the exclusive remedy for actions against FTCA covered I/T/U providers, those entities are not required to obtain professional liability insurance.

Licensure of Health Care Professionals: Section 221 of the IHCA, 25 U.S.C. § 1621t, permits an Indian tribe or tribal organization to employ a health care professional who is subject to licensure if that individual is licensed in any state. Employees of the IHS obtain their “licensed in any state” status through other federal law.

Medical Quality Assurance Requirements: Under federal law, there are specific privacy rules governing quality assurance for the I/T/U providers that must be considered as requirements are imposed by the QHP. Section 805 of the IHCA, 25 U.S.C. § 1675, facilitates internal medical program quality reviews; shields participants in those reviews; and restricts disclosure of medical quality assurance records.

Claims Format: Section 206(h) of the IHCA, 25 U.S.C. § 1621e(h), prohibits insurance carriers from denying a claim submitted by the IHS, an Indian tribe or tribal organization based on the format on which the claim is submitted if the format complies with the Medicare claims format requirements. As a result, an I/T/U provider may use a claims format offered by the QHP, or it may submit claims in a format that is consistent with Medicare claims.

Payment of Claims: Section 206(a) and (i) of the IHCA, 25 U.S.C. § 1621e(a) and (i), provide that the IHS, an Indian tribe, tribal organization, and urban Indian organization have the right to recover the reasonable charges billed, or, if higher, the highest amount an insurance carrier would pay to other providers. This Model QHP Addendum provision states that a QHP must pay claims to the I/T/U provider according to Section 206 of the IHCA, except to the extent the I/T/U provider agrees in writing to accept rates or amounts specified in this agreement as payment in full. Also, it notes that such rates should be at least equal to the generally applicable payment rate that the QHP pays to any of its other preferred or in-network providers.

Contract Health Service Referral Requirements: In some instances, I/T/U providers may be subject to referral requirements under the contract health services program, and may not be able to adhere to QHP issuer referral requirements to use in-network providers. This section acknowledges the potential for conflicting requirements, and that I/T/U providers may be prevented from following QHP issuer referral requirements in such instances.